calls, artificial or prerecorded voice messages, telephone solicitations and facsimile advertisements. It is a quasi-criminal statute, stating that certain actions are prohibited and may be subject to suits by private individuals or State Attorneys General (on behalf of all residents of a State) for civil penalties of up to $1,500 per violation of the TCPA or actual monetary loss from such a violation. 47 U.S.C. § 227(b)(1)(C), (b)(3), (f)(1).

With regard to facsimile advertising, the TCPA states that, "It shall be unlawful for any person within the United States-- ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). "Unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). The terms "express," "invitation" and "permission" are not defined in the statute. Additionally, there are no Congressional findings which reference facsimile advertising or which comment on these terms. 47 U.S.C. § 227 (Congressional findings, Public Law 102-243). The FCC, however, is given authority to draft regulations and rules to administer the TCPA. 47 U.S.C. § 227(c)[1]; P.L. 102-243, § 3(c), 105 Stat. 2402, Oct. 28, 1992; P.L. 102-556, Title I, § 102, 106 Stat. 4186.[2]

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[1] "Rulemaking proceeding required. Within 120 days after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall-- ... (E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section."

[2] "(1) Regulations. The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [adding this section and amending 47 USCS § 152(b)] not later than 9 months after the date of enactment of this Act."

Under the TCPA and the FCC rules thereunder, Plaintiff's provision of his facsimile number to Staples and his established business relationship with Staples constituted the requisite consent to receipt of facsimile advertisements from Staples under the law which existed as of March 2003.

**1. Legislative history of the TCPA: There is no legislative history as to the meaning of "unsolicited advertisement" and "prior express invitation or permission," but there is a clearly expressed intent not to interfere with *established business relationships*.**

The TCPA began as two separate bills, one concerning telemarketing through the use of autodialing systems and one concerning facsimile advertising. See H.R. 101-628 (January 24, 1989) ("Restrictions on the Use of Telephone Autodialing Systems"); H.R. 101-2131 (April 26, 1989) ("Automated Telephone Solicitation Protection Act of 1989"); H.R. 101-2184 (May 2, 1989) ("Facsimile Advertising Regulation Act"). The original bill containing telemarketing restrictions contained an explicit business relationship exception. Ibid. The original bill containing facsimile advertising restrictions did not. Ibid.

In hearings on the proposed facsimile advertising restrictions, the sponsors of the facsimile bill acknowledged that facsimile advertising was "not a problem now," but had received two letters from constituents and receiving facsimile advertisements "bug[ged] the hell out of" the sponsor of the bill. Telemarketing Practices, Hearing before the Subcommittee on Telecommunications and Finance, Serial No. 101-43, May 24, 1989, at p. 25. Congressman Rinaldo pointed out that the problems entailed by receiving unwanted facsimiles went beyond advertising to political speech, as well:

> Let me give you a perfect example of what's happening. Yesterday, and I don't even know if it's the first time or not. I was walking past the fax machine in our

> office and we received a multi-paged letter from a lobbyist in opposition to a particular piece of legislation.

Id. at p. 26. Other portions of the hearings centered on the equal annoyance of "fax attacks," in which political officials had been inundated with political speech via facsimile. Id. at p. 3.

Restrictions on telemarketing and facsimile advertising were merged into one bill in July of 1989, in House Resolution 2921. Included in this bill, entitled the Telephone Advertising Regulation Act, were restrictions on autodialing, prerecorded voice messages and facsimile advertising. H.R. 101-2921.

The Act underwent various revisions in Committee and before Congress. The Senate version of the Act, S. 1410, as it was introduced on the Senate floor, contained no exception for an established business relationship in the context of telephone ***or*** facsimile advertising. Congressional Record, November 7, 1991, S. 16200 to S. 16203. Despite absolutely no reference in the bill to the established business relationship exception, the sponsors of the bill stated that the bill would not prohibit businesses from contacting their existing customers:

> [MR. PRESSLER]: This bill will not prohibit businesses from contacting their established customers. ... We have directed the FCC to further define the rules and regulation [sic] needed to allow businesses to contact customers who expected to receive calls from companies they do business with. The purpose of the substitute [bill] is to prohibit cold calls by any telemarketer to the telephone of a consumer who has no connection or affiliation with that business and who has affirmatively taken action to prevent such calls.

Congressional Record, November 7, 1991, S. 16202.

Senator Al Gore of Tennessee noted that earlier drafts of the telephone portion of the bill included an explicit exception for established business relationships. Congressional Record, November 7, 1991, S. 16204. Senator Gore requested and received clarification from the bill's sponsors that, even though the bill did not contain any references to established

business relationships, the FCC would have the authority to "make different rules concerning calls made by businesses to their prior or existing customers":

> [MR. GORE]: Is it not true that the committee deleted the established business relationship exception from the bill because it did not want to become involved in the technicalities of determining what this phrase means? Nevertheless, is it not true that the FCC may consider establishing different rules concerning calls made by businesses to their prior or existing customers?
>
> [MR. PRESSLER]: Yes, that is correct.

Congressional Record, November 7, 1991, S. 16204.

The House Committee from which the bill originated, the Energy and Commerce Committee, stated explicit findings regarding the definition of "telephone solicitation," but stated no findings with regard to the definition of "unsolicited advertisement" and shed no light on the terms "express," "invitation" and "permission." 47 U.S.C. § 227 (Congressional Findings). It was not unaware that the statute's failure to define these terms resulted in ambiguity. In materials presented to the Committee in hearings on facsimile advertising, the Committee was presented with the precise quandary that this Court must address, the meaning of "unsolicited," "invitation" and "permission." See Telemarketing Practices, Hearing before the Subcommittee on Telecommunications and Finance, Serial No. 101-43, May 24, 1989, at p. 63. Law professor Robert L. Ellis of Indiana University noted the precise issues in the legislation presented in this case.

> **One of the core phrases used by H.R. 2184 is "unsolicited advertisement," which is defined as "any material advertising the commercial availability of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." This definition is problematic for several reasons. First, it begs the question of what "unsolicited" means. When, for example, does a prior business contact constitute "express invitation or permission"?**

Id.

Instead of clarifying these terms, the Committee noted that it purposely did not define the words "express invitation or permission":

> **The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling *need for such consent* to be in written form.**

House Report 102-317, at p. 13. The Committee did make it clear that it did not intend to unduly interfere with established business relationships:

> **The bill reflects ... a desire to not unduly interfere with ongoing business relationships.**
> * * *
> **The Committee does not intend for [the telemarketing] restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.**

House Report, 102-317, at pp. 13, 17.

In discussing the definition of "telephone solicitation," the House Committee noted that there was no explicit exception for circumstances where the consumer gave a number to the caller. However, the Committee stated that where a consumer gives a number to a caller, the term "telephone solicitation" would not apply:

> **The term does not apply to calls or messages where the called party has in essence *requested the contact* by providing the caller with their telephone number for use in normal business communications.**

House Report No. 102-317, at p. 13.

As passed on December 20, 1991, the Telephone Consumer Protection Act of 1991 acknowledged the FCC's broad role in administering the statute:

> (1) **Regulations. The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [adding this section and amending *47 USCS § 152*(b)] not later *than 9 months after the date of enactment of this Act.***

47 U.S.C. § 227, "Other Provisions," following the Congressional findings (quoting October 28, 1992, Public Law 102-556, Title I, § 102, 106 Stat. 4186). The President signed this bill into law because it gave the FCC "ample authority to preserve legitimate business practices." Statement by the President upon signing the TCPA into law, December 20, 1991, cited in the 1992 FCC Report, 7 FCC RCD 8752, n. 1.

In sum, there is essentially no legislative history on the meaning of the terms "unsolicited advertisement" and "prior express invitation or permission." There are no specific express Congressional findings regarding the regulation of facsimile advertising. This leaves the definition of these terms and the regulation of facsimile advertising largely to the F.C.C.'s discretion. This discretion is to be exercised against a backdrop in which the sponsors of the TCPA repeatedly expressed their intention that the Act "not unduly interfere with ongoing business relationships."

2. **History of the TCPA after its enactment: The F.C.C. has held for eleven years that advertisers may send facsimiles to persons with whom they have established business relationships and Congress has not, despite reconsidering the FCC's authority, reversed this ruling.**

After the TCPA's enactment on December 20, 1991, the FCC adopted its rules and regulations implementing the TCPA on October 16, 1992. The FCC stated in its initial report that the sending of facsimile advertisements to persons with whom the senders have established business relationships could be deemed invited or permitted:

> **In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra.**

*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752, 8779, para. 54, n. 87, CC Docket No. 92-90, FCC 92-443 (1992) ("1992 Report"); see also Id., at para. 34 ("[T]he legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships.").

The 1992 Report also expanded on the notion which had previously been expressed by the House Committee on Energy and Commerce that persons who gave out their telephone numbers had given their consent to being called at such numbers:

> **If a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. [Fn.] Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.**

7 FCC Rcd. 8752, 8769(31) (October 16, 1992) (footnote omitted).

Subsequent to the FCC's 1992 Report, Congress revisited the authority of the FCC to administer the TCPA. On October 28, 1992, Congress added subsection (C) to section (b)(2), expanding the FCC's authority to exempt certain calls to cellular telephones from the prohibitions of the TCPA. Congress did not, however, restrict the authority which the FCC had already exercised with regard to facsimile advertising. See 47 U.S.C. § 227 (see History, Ancillary Laws and Directives: Amendments, October 28, 1992).

In 1995, the Commission reiterated its ruling that an established business relationship supplied the necessary consent for receipt of facsimile advertisements:

> **The [1992] Report and Order makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions.**

*In The Matter Of Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991, Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408, CC Docket No. 92-90, F.C.C. Release No. 95-310 (1995), para. 37.

Congress again revisited the TCPA in March 2003 in enacting the "Do-Not-Call Implementation Act." Public Law 108-10. On March 11, 2003, President Bush signed this bill into law. The Act specifically referenced the 1992 rules and regulations issued by the FCC under the TCPA, and ordered the FCC to complete its rulemaking proceedings with respect to the do-not-call list:

> **Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.).**

Public Law 108-10 (2003). See 15 U.S.C. § 6101, notes following statute. The Act further provided that the FCC was to submit to Congress "a review of the enforcement proceedings ... under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.) ..." Public Law 108-10, § (b)(6). Despite revisiting the TCPA and specifically referencing the FCC's 1992 Report, Congress did nothing to restrict the FCC's authority under the TCPA or to disapprove of the FCC's previous findings regarding facsimile advertising.

On June 26, 2003, the F.C.C., after receiving public comments on its rules and regulations, created a new rule that to satisfy the requirement of "invitation" or "permission" under the TCPA, written permission to send such advertisements would be required beginning on August 25, 2003:

> **As of the effective date of these rules [August 25, 2003], the EBR will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements. * * ***

> **Under the new rules, the permission to send fax advertisements must [among other requirements] be provided in writing [and] include the recipient's signature and facsimile number ...**

2003 FCC LEXIS 3673, CG Docket No. 02-278, FCC 03-153, para.'s 189, 191, 222 (adopted June 26, 2003, filed July 25, 2003). In this Order, the F.C.C. made it clear that entities which had relied on the FCC's old rule regarding facsimile advertising were "in compliance" with the TCPA and regulations thereunder:

> **We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules.**

Id. at para. 189, fn. 699 (adopted June 26, 2003, filed July 25, 2003).

On August 25, 2003, the F.C.C., in response to an influx of petitions and comments as to the scope and effects of the newly announced changes, delayed the effective date of the signed-writing requirement until January 1, 2005 and reaffirmed the vitality until then of its long-standing conclusion regarding established business relationships:

> **We emphasize that our existing TCPA rules prohibiting the transmission of unsolicited advertisements to a telephone facsimile machine will remain in effect during the pendency of this extension. Under these rules, those transmitting facsimile advertisements must have an established business relationship or prior express permission from the facsimile recipient to comply with our rules. ... Therefore, until the amended rule at 47 C.F.R. § 64.1200(a)(3)(i) becomes effective on January 1, 2005, an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements.**

*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order on Reconsideration*, 2003 FCC LEXIS 4611, CG Docket No. 02-278, FCC 03-208, para. 6, fn. 24 (August 25, 2003).

In sum, for a period spanning more than eleven years, the FCC has interpreted the TCPA to allow facsimile advertisers to send facsimiles to their established customers. Congress has, on at least two occasions since the F.C.C.'s initial 1992 Report, reconsidered the TCPA. However, not once has Congress reversed or revised the FCC's rulings or restricted the FCC's authority regarding facsimile advertising. To the contrary, Congress has expanded the FCC's authority under the TCPA during this period. See 47 U.S.C. § 227 (History, Ancillary Laws and Directives, Amendments: October 28, 1992); Public Law 108-10 (contained in 15 U.S.C. § 6101, notes following statute).

## IV. ARGUMENT AND CITATION OF AUTHORITY

It is undisputed that on March 18, 2003, Staples sent a facsimile advertisement to Mattison R. Verdery, C.P.A., P.C., an established customer and member of the Staples Business Rewards program. Plaintiff has filed suit for violation of the TCPA and various state law causes of action. Staples moves for summary judgment on the following grounds: (A) Staples did not violate the TCPA by the transmission of the Facsimile at issue to Verdery; (B) Plaintiff's provision of his facsimile number to Staples constitutes express permission, *invitation and consent to receipt of the Facsimile*; (C) Subjecting Staples to penalties for conduct which the FCC declared to be legal would violate the due process clause and excessive fines clause of the United States Constitution; (D) The TCPA, by applying only to facsimiles which solicit "commercial" products and services, unconstitutionally restricts the rights of Staples to exercise free speech; (E) Georgia's statute respecting facsimile advertising exempts facsimiles sent to persons with whom the sender or sender's principal has a business or contractual relationship; (F) Under Georgia's statute regarding facsimile advertising, suits by

customers against companies which sent them facsimiles are not permitted; and (G) Staples is not liable under the state law theories alleged by Plaintiff for conduct which has been declared legal by the FCC.

Quick Link moves for summary judgment on these same grounds and on the additional ground that (H) Quick Link is not considered the "sender" of the Facsimile under the TCPA, and is therefore not liable for the transmission of the Facsimile to Plaintiff.

## A. STAPLES DID NOT VIOLATE THE TCPA BY THE TRANSMISSION OF THE FACSIMILE AT ISSUE TO VERDERY.

The conduct of Staples in transmitting the Facsimile to Verdery was entirely legal conduct under the TCPA and the FCC regulations thereunder. The FCC had the authority to interpret the statute to allow advertisers to send facsimile advertisements to persons and entities with whom they have established business relationships. Even if the Court finds that the FCC overstepped its authority by allowing such facsimiles, the FCC had the authority to declare that persons who had complied with their interpretations over the preceding eleven-plus years were deemed in full compliance with the TCPA and the regulations thereunder.

### 1. The FCC's administration and interpretation of the TCPA provisions regarding facsimile advertisements must be upheld as reasonable.

As demonstrated in the section of this brief regarding the legislative history of the TCPA (see Section III, infra), there were no congressional findings regarding the meaning of "prior express invitation or permission" under the TCPA. Congress's decision not to define these terms was intentional. Instead, Congress decided to give the FCC broad regulatory powers over the enforcement and administration of the TCPA, including the power to flesh out the meaning of undefined terms. The FCC was left to implement what one court has called a

"skeleton" statute, which contained findings which strongly indicate a desire not to unduly interfere with established business relationships. In debate on the floors of Congress, even when there was no established business relationship exception contained in any portion of the bill, the bill's sponsors stated that the TCPA was not meant to restrict contacts by businesses with their customers. In this legislative context, the FCC properly ruled that advertisers could send facsimile advertisements to persons with whom they had established business relationships. This ruling was based on a reasonable interpretation of the TCPA and the authority granted to the FCC under the TCPA.

**a. The FCC's administration and interpretation of the TCPA are entitled to great deference.**

As the Georgia Court of Appeals recognized in Schneider v. Susquehanna Radio Corporation, this Court cannot ignore "[t]he power of an administrative agency to administer a congressionally created program [which] necessarily requires the formulation of policy and the making of rules to fill in any gap left, implicitly or explicitly, by Congress." 260 Ga.App. 296, 300 (2003) (*citing* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984)). In Schneider, a case which concerned recorded voice message solicitations, the Court deferred to the FCC's interpretation of what it meant for a recipient of a call to have given "prior express consent." Schneider, 260 Ga.App. at 301 ("In discussing the category permitting telemarketing calls made with the person's 'prior express consent,' the FCC concludes that 'persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.'").

Similarly, in Charvat v. Dispatch Consumer Servs., the Ohio Supreme Court also acknowledged the authority of the FCC to define terms under the TCPA, which it referred to as a "skeleton of a system." 95 Ohio St. 3d 505, 769 N.E.2d 829, 831-34 (Ohio 2002) (holding that Congress implicitly left the definition of the term "established business relationship" to the FCC: "[T]he TCPA is the skeleton of a system designed to rein in the proliferation of telemarketing calls. Much of the detail was left to the F.C.C. Congress's delegation was both explicit and implicit.").

"[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Morton v. Ruiz, 415 U.S. 199, 231 [94 S. Ct. 1055, 39 L. Ed. 2d 270] (1974). Thus, the deference which the Court must give to the FCC with regard to its administration of the TCPA also extends to the FCC's interpretation and application of the TCPA. Stinson v. United States, 508 U.S. 36, 44-45 (113 S. Ct. 1913, 123 L. Ed. 2d 598) (1993) ("[A Commission's] commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice. The functional purpose of commentary * * * is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. * * * As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (Sentencing Commission context).

Here, the TCPA provides simply that "prior express invitation or permission" removes an advertisement from the prohibition on certain "unsolicited advertisement[s]." Neither "invitation" nor "permission" nor what is sufficient to show "express" invitation or permission is defined in the TCPA. The legislative history is equally devoid of any delineation of these terms (e.g., how "permission" can differ from "invitation"). Congress therefore left a gap in the TCPA as to what constitutes "prior express invitation or permission."[3] 47 U.S.C. § 227(a)(4).

Congress itself acknowledged that the absence in the TCPA of a definition for "invitation or permission" was a deliberate gap left in the TCPA. See House Report 102-317 at p. 13 ("The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form."). Congress also acknowledged its "desire to not unduly interfere with ongoing business relationships." Id. The Congressional findings under the TCPA provide no further insights into the regulation of facsimile advertising. See 47 U.S.C. § 227 (Congressional Findings following the statute: no findings specifically applicable to facsimile advertising).

In this context, the Court cannot substitute its own judgment regarding the meaning of the TCPA for that of the FCC. The FCC's reading of the statute to allow advertisers to send

[3] See Schneider, 260 Ga.App. 296, 300 ("It is clear from the House Report quoted above that Congress did not intend the interpretation of the TCPA urged by Schneider. Moreover, to adopt Schneider's interpretation would require us to ignore all FCC rules and reports regarding the exemptions to the TCPA. In accordance with United States Supreme Court authority, HN9courts are obliged to defer to an agency's rulemaking authority. The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

facsimiles to recipients with whom they have established business relationships is reasonable and entitled to deference. Under the rules which existed prior to and as of the date of transmission of the Facsimile, therefore, the transmission of the Facsimile to Staples' customer, Verdery, was entirely legal conduct. See Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.") (citations and quotations omitted). Therefore, Staples cannot be held liable under the TCPA for transmission of the Facsimile to Plaintiff.

**b. The reliance placed by parties, including Staples, upon the FCC rules regarding facsimile advertising over the past eleven years favors deference to the FCC.**

When considering the reasonableness of the FCC's interpretation and administration of the TCPA, the Court should also consider the extent to which reliance may have been placed on the FCC's guidance by parties such as Staples.

The United States Supreme Court has held that where there has been long-standing reliance on an agency's interpretation, greater deference is owed to the agency's interpretation. In Train v. Natural Resources Defense Council, Inc., the Supreme Court held that the Environmental Protection Agency's construction of the Clean Air Amendments of 1970 was a reasonable interpretation. 421 U.S. 60; 95 S. Ct. 1470; 43 L. Ed. 2d 731 (1975). This decision was based in part on the fact that there had been reliance placed on the EPA's interpretation by parties affected by the legislation at issue:

> We therefore conclude that the Agency's interpretation of § § 110 (a)(3) and 110 (f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with

> administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency. *Udall v. Tallman, 380 U.S. 1, 16-18 (1965); McLaren v. Fleischer, 256 U.S. 477, 480-481 (1921).*

421 U.S. at 75, 87.

Similarly, in Davis v. United States, the Supreme Court held that long use of an agency interpretation warranted further deference to that interpretation:

> [W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.

495 U.S. 472, 484, 109 L. Ed. 2d 457, 110 S. Ct. 2014 (1990).

The FCC's interpretation and administration of the TCPA facsimile provisions in 1992 (contemporaneous with enactment of the statute) and 1995 is entitled to great deference. The transmission in March 2003 of the Facsimile to Staples' existing customer, Verdery, was therefore in full compliance with the TCPA.

**c. The fact that courts have applied the FCC's interpretation and administration of the TCPA facsimile advertisement provisions favors upholding the FCC's interpretation and administration of the provisions as reasonable.**

In the eleven-plus years since the FCC first interpreted the facsimile advertising provisions of the TCPA, state courts, federal courts and other branches of the federal government have followed the FCC's rules regarding facsimile advertising. This further illustrates the correctness of Staples' position.

In the case of Kaufman v. ACS Systems, Inc., the California Court of Appeal recognized: "A fax broadcaster may send advertisements to those with whom it or the

advertiser has an established business relationship." 110 Cal. App. 4th 886, 911, 2 Cal. Rptr. 3d 296, 317 (Cal.Ct.App. 2003). Similarly, in Texas v. Am. Blast Fax, Inc., the United States District Court for the Western District of Oklahoma found that a defendant in a TCPA suit by a state attorney general, was only liable for facsimile advertisements which were sent to persons with whom it did not have established business relationships. 164 F. Supp. 2d 892, 900 (W.D. Tex. 2001) (facsimiles to persons with business relationships with sender not counted as part of violations for which damages could be awarded: "[T]he Court has already held defendant Blastfax violated the TCPA by sending intrastate fax advertisements in Texas without the recipient's consent or permission, and to recipients with whom the defendants had no established business relationship."). In Destination Ventures v. FCC, the Department of Justice and the U.S. Attorney General also acknowledged the reasonableness of the FCC's interpretation: "The government responds that the TCPA permits unsolicited faxes in established business relationships because the FCC concluded that a solicitation can be deemed invited or permitted when a prior business relationship exists." *844 F. Supp. 632, n.1 (D.Or. 1993).*

There is no sufficient reason to doubt the reasonableness of the FCC, the U.S. Attorney General, the Department of Justice and the state and federal courts that have consistently upheld the FCC's construction of the TCPA's provisions regarding facsimile advertising. There are no reported appellate cases, state or federal, which contradict Staples' position. Having followed the FCC's rules, Staples cannot be held liable for violation of the TCPA for sending a facsimile advertisement to its existing customer, Verdery.

**d. Congressional failure to intervene to restrict the FCC's authority, despite revisiting the TCPA twice since the FCC's interpretation of facsimile advertising restrictions, also favors deference to the FCC's interpretation.**

As established in the section of this brief detailing the history of the TCPA, Congress has twice revisited the TCPA since the FCC's initial determination that facsimile advertisements sent to persons with whom the sender has an established business relationship are permitted under the TCPA. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" Commodity Futures Trading Comm'n. v. Schor, 478 U.S. 833, 846, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) (*quoting* NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted)).

Congress most recently revisited the TCPA in March 2003. Congress's failure, merely eight months ago, to revise or repeal the FCC's interpretation with regard to facsimile advertising further supports upholding its interpretation.

**2. Regardless of whether the FCC was reasonable in its interpretation and administration of the TCPA regarding facsimile advertising, the FCC has the clear authority to make interpretative changes prospective so as to minimize the effect of its past rulings on parties who have relied on them.**

Upon prospectively changing its rules on facsimile advertising in July 2003 to require a signed writing (for which implementation was delayed through 2005), the FCC declared that parties who had previously sent facsimile ads to their customers were in compliance with the TCPA. Regardless of the correctness of its interpretations, the FCC was required by constitutional notions of fairness and due process to make its new rules prospective only, as it

did when it ruled that pre-change facsimile advertisements sent to customers were in compliance with the TCPA.

Agencies may not change their interpretations of a statute without taking account of legitimate reliance on prior interpretation. In Smiley v. Citibank (S.D.), N.A., the Supreme Court held, with regard to changes in agency interpretation:

> Sudden and unexplained [agency] change [Cit.] or change that does not take account of legitimate reliance on prior interpretation [Cit.] may be 'arbitrary, capricious [or] an abuse of discretion.' But if these pitfalls are avoided, change is not invalidating, since the whole point of Chevron is to leave the discretion provided by ambiguities of a statute with the implementing agency.

517 U.S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). Even prior to the Court's decision in Chevron, the Court had previously held that where a party has been "affirmatively misled" by "longstanding official administrative construction" into believing that its conduct is not prohibited, this may serve as a defense to liability. United States v. Pennsylvania Ind. Chemical Corp., 411 U.S. 655, 670, 93 S. Ct. 1804, 36 L. Ed. 2d 567 (1973). Were the law otherwise, the IRS, for example, could mislead millions of taxpayers in its tax return publications into taking an exemption only to later enforce a purported prohibition on such exemptions.

In July 2003, the FCC prospectively changed its rules regarding facsimile advertising under the TCPA to require that senders of facsimile advertisements obtain a "signed writing." 2003 FCC LEXIS 3673, CG Docket No. 02-278, FCC 03-153, para.'s 189, 191, 222 (adopted June 26, 2003, filed July 25, 2003). The FCC made it clear that entities relying on its previous rules were "in compliance" with the TCPA and the regulations thereunder. Id. at para. 189, fn. 699 ("We emphasize that, prior to the effectuation of rules contained herein, companies that

transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules."). The FCC's position is in accordance with its duty to avoid decisions which are "arbitrary, capricious or an abuse of discretion." Congress should not be presumed to have required the FCC to act arbitrarily and capriciously to change its interpretative rulings without accounting for "legitimate reliance on prior interpretation." Smiley, 517 U.S. at 742.

Thus, the FCC plainly was correct in ruling that persons who had sent facsimile advertisements pursuant to existing FCC rules were "in compliance" with the TCPA and the regulations thereunder. Staples, having been deemed by the FCC to be in compliance with the TCPA, cannot be held liable under the TCPA for transmission of the Facsimile at issue in this case to its existing customer, Verdery.

### B. VERDERY'S PROVISION OF HIS FACSIMILE NUMBER TO STAPLES CONSTITUTES EXPRESS PERMISSION, INVITATION AND CONSENT UNDER THE TCPA TO RECEIVE FACSIMILE ADVERTISEMENTS FROM STAPLES.

As demonstrated in the Statement of Facts, Plaintiff provided his facsimile number to Staples without expressing restrictions on its use and without being informed of any restrictions which Staples would place on its use. Under these circumstances, Plaintiff has provided his express permission, invitation and consent to receipt of the Facsimile.

The FCC has ruled that one's provision of a telephone number constitutes express permission, invitation and consent to receiving telemarketing calls. See Schneider, 260 Ga.App. at 301 ("In discussing the category permitting telemarketing calls made with the person's 'prior express consent,' the FCC concludes that 'persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number

which they have given, absent instructions to the contrary.'"). The provision of a facsimile number is thus within the definition of "invitation" and "permission" as defined under FCC rules, and therefore, Plaintiff's provision of his facsimile number to Staples bars his action under the TCPA and FCC rules thereunder. 47 U.S.C. § 227.

### C. TO THE EXTENT THAT THIS COURT APPLIES THE TCPA TO PROHIBIT THE TRANSMISSION OF THE FACSIMILE AT ISSUE HERE, SUCH APPLICATION WOULD VIOLATE THE DUE PROCESS CLAUSE AND THE EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION.

The TCPA prohibits the sending of "unsolicited advertisements," which are advertisements sent without "prior express invitation or permission." 47 U.S.C. § 227. In passing the TCPA, Congress acknowledged its own decision not to define the phrase "prior express invitation or permission" under the statute. House Report No. 102-317, at p. 13. The only guidance under the TCPA regarding facsimile advertisements is contained in the FCC rules and regulations, which for the past eleven-plus years have allowed advertisers to send facsimile advertisements to their customers. See § III(2), infra. To allow this lawsuit to go forward would require gutting the TCPA of any guidance as to the meaning of "express," "invitation" and "permission" and would render the statute meaningless and void for vagueness. U.S. Const., amends. V, XIV.

Because the TCPA prescribes civil penalties of up to $500 per violation, $1,500 per willful violation, the statute is quasi-criminal in nature, and absent clear interpretive guidance from the FCC, it would fail under the least stringent constitutional standard of fair notice and due process. As in A.B. Small Co. v. American Sugar Refining Co., "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it

authorizes [by court and jury after the act] to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." 267 U.S. 233, 239, 45 S. Ct. 295, 69 L. Ed. 589 (1925). When read in conjunction with the FCC's rules and regulations, the TCPA gave no prior indication to parties such as Staples and Quick Link that the transmission of facsimile advertisements to its existing customers, such as Verdery, might be proscribed.

Absent clear administrative guidance, merely prohibiting the transmittal of facsimile advertisements unless there is "invitation" or "permission," does not provide fair notice of what conduct is proscribed. "Invitation" may be just as validly construed to be "a formal request" as an "incentive or inducement," and "permission" may just as validly be construed to be a formal request as it can be an act which "make[s] possible." Webster's online dictionary defines "invitation" as:

| | |
|---|---|
| **in·vi·ta·tion** | Function: noun<br><br>**1 a :** the act of inviting<br>**b :** an often formal request to be present or participate<br>**2 :** INCENTIVE, INDUCEMENT |
| **in·vite** | Function: transitive verb<br>Inflected Form(s): in·vit·ed; in·vit·ing<br><br>**1 a :** to offer an incentive or inducement to : ENTICE<br>**b :** to increase the likelihood of<br><br>**2 a :** to request the presence or participation of<br>**b :** to request formally<br>**c :** to urge politely : WELCOME |

[Webster's Dictionary, http://www.m-w.com/cgi-bin/dictionary]. It further defines "permission" as:

| | |
|---|---|
| **per•mis•sion** | Function: noun<br><br>**1** : the act of permitting<br>**2** : formal consent : AUTHORIZATION |
| **per•mit** | Function: verb<br>transitive senses<br><br>**1** : to consent to expressly or formally <permit access to records><br>**2** : to give leave : AUTHORIZE<br>**3** : to make possible |

Id.

The reason for inclusion of these vague terms in the TCPA is clear. The TCPA is merely a "skeleton of a system [for which] [m]uch of the detail was left to the F.C.C." Charvat v. Dispatch Consumer Servs., 95 Ohio St. 3d 505, 769 N.E.2d 829, 831-34 (Ohio 2002). To allow this suit to go forward would require stripping the TCPA of the only available guidance as to the meaning of the TCPA's prohibitions on facsimile advertising, namely the guidance of the FCC. Additionally, it would potentially subject Staples and Quick Link to civil fines in excess of those allowed under the Eighth Amendment for conduct which the FCC has repeatedly and consistently declared to be legal conduct. See Wright v. Riveland, 219 F.3d 905, 914-19 (9th Cir.2000) (holding that restitution for criminal offense could be considered excessive fine, despite being in the nature of a civil proceeding: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment," *quoting* Austin v. United States, 509 U.S. 602, 609-10, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993)).

This is not a case in which willfulness, an entire want of care raising the presumption of indifference to the consequences or malice is even remotely at issue. O.C.G.A. §§ 13-6-11, 51-12-5.1. The FCC explicitly declared the conduct at issue in this case to be legal. Georgia law expressly provides that the conduct at issue in this case was legal. O.C.G.A. § 46-5-25. To disregard the FCC's guidance would render the statute void for vagueness.

### D. THE TCPA UNCONSTITUTIONALLY RESTRICTS THE FREE SPEECH RIGHTS OF STAPLES.

The TCPA only *restricts* the *transmission* of facsimiles "advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(4), (b)(1)(C). It does not, therefore, prohibit such facsimiles when made for charitable organizations or to solicit donations. The United States District Court in Colorado, in Mainstream Mktg. Servs. v. FTC, recently held that the do-not-call list, by exempting charitable organizations, violated the First Amendment. 2003 U.S. Dist. LEXIS 16807 (D.Colo. 2003).

The legislative history of the TCPA contains bare findings regarding facsimile advertising, only finding that receipt of unexpected facsimiles "shifts some of the costs of advertising from the sender to the recipient ... [and] occupies the recipient's facsimile machine so that it is unavailable for other messages ... regardless of their interest in the product or service being advertised." House Report No. 101-633, at p. 4 (1990). As enacted, the TCPA itself contains no Congressional findings concerning facsimile advertising. 47 U.S.C. § 227 (Congressional findings); P.L. 102-243.

Facsimile advertisements shift no more cost than any other unexpected facsimiles, such as letters faxed to opposing counsel, notices faxed by judges' offices and faxes soliciting

donations. There are no congressional findings which suggest that there is any greater prevalence of advertising facsimiles than any of these other types of unexpected facsimiles. The distinction between facsimiles which advertise property, goods and services and those which do not is a pure content-based distinction without basis in fact. Therefore, the TCPA's restriction on only facsimiles which advertise commercial availability of products, goods or services is arbitrary and capricious and cannot be said to materially advance a substantial government interest. Mainstream Mktg. Servs., 2003 U.S. Dist. LEXIS 16807 at *39 (applying the intermediate scrutiny standards for regulation of commercial speech set forth in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) ("When a regulatory regime is pierced by content-based exemptions and inconsistencies in the government's explanation as to how the regime advances a substantial interest, it must fail under the First Amendment. [Cit.] Simply stated, the government's practice cannot be at odds with the asserted government interest. [Cit.] The regulation cannot distinguish among the indistinct, permitting a variety of speech that entails the same harm as the speech which the government has attempted to limit.")).

There is no indication in the TCPA or its legislative history as to why a facsimile sent to elicit donations or to advertise a fundraiser or other event has any less propensity to shift costs and tie up facsimile machines than a facsimile sent to advertise "the commercial availability or quality of any property, goods or services." Thus, the TCPA distinguishes between the indistinct and impermissibly restricts the rights of Staples to engage in free speech vis-a-vis its customers.

## E. THE F.C.C.'S "ESTABLISHED BUSINESS RELATIONSHIP" RULES AND ORDERS ARE ENTIRELY CONSISTENT WITH THE CORRESPONDING GEORGIA STATUTE, O.C.G.A. § 46-5-25, WHICH ALLOWS FACSIMILE ADVERTISEMENTS TO BE SENT IF THERE IS A "PRIOR CONTRACTUAL OR BUSINESS RELATIONSHIP" BETWEEN THE RECIPIENT AND THE SENDER.

Another bar to suits by Georgia facsimile recipients who have established business relationships with the senders of those facsimiles is contained in O.C.G.A. § 46-5-25. O.C.G.A. § 46-5-25 prohibits the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements. However, the prohibition in O.C.G.A. § 46-5-25 "shall not apply where the recipient has consented to the receipt of one or more telefacsimile messages **or where there exists a prior contractual or business relationship between the recipient and the initiator or the initiator's principal.**" O.C.G.A. § 46-5-25(c)(1) (emphasis added).

Consequently, the "established business relationship" rules and orders, as enunciated by the F.C.C., are fully consistent with Georgia's own statutory requirements, as enacted by the State Legislature. Furthermore, it should be noted that, by the TCPA's express terms, "nothing in this section or in the regulations prescribed under this section shall preempt **any state law** that imposes more restrictive intrastate requirements or regulations on, or **which prohibits ... the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements** ..." 47 U.S.C. § 227(e)(1)(A) (emphasis added). As a state statute "which prohibits ... the use of telephone facsimile machines ... to send unsolicited advertisements," O.C.G.A § 46-5-25 is therefore not preempted by the TCPA. See also Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995) (concluding that the "savings clause" of section

227(e)(1) does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted).[4]

In sum, the F.C.C.'s rules and orders unequivocally allow facsimile advertisements to be sent under the TCPA if an established business relationship exists between the sender and the recipient. Such an approach is completely in keeping with the structure and content embodied in O.C.G.A. § 46-5-25.

**F. TCPA SUITS BY FACSIMILE RECIPIENTS AGAINST FACSIMILE SENDERS WITH WHOM THE RECIPIENTS HAVE ESTABLISHED BUSINESS RELATIONSHIPS ARE NOT "OTHERWISE PERMITTED" *UNDER THE LAWS OF GEORGIA.***

47 U.S.C. § 227(b)(3) allows for suits under the TCPA only "if otherwise permitted by the laws or rules of court of a State." In Hooters of Augusta, Inc. v. Nicholson, the Georgia Court of Appeals held that O.C.G.A. § 46-5-25 did not expressly prohibit suits under the TCPA, and therefore such suits were "otherwise permitted" in Georgia under 47 U.S.C. § 227(b)(3). 245 Ga.App. 363, 365 (2000). The Court based its holding on the fact that O.C.G.A. § 46-5-25 had been enacted before the TCPA, and therefore the decision whether to include a private right of action under the TCPA had not been a "considered choice" by the Legislature. Id., at 366.

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[4] More recently, the F.C.C. has stated, with respect to the scope of preemption of state laws by the TCPA, as follows: "We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. ... We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 2003 FCC LEXIS 3673, FCC 03-153, CG Docket No. 02-278, para. 84. By deferring to the F.C.C. rulings that established business relationships establish the requisite consent to the receipt of facsimile advertisements, this Court will help minimize "any alleged conflicts between state and federal requirements" and help promote uniformity between the Georgia and federal statutory/regulatory frameworks governing facsimile advertisements.

In contrast, the State Legislature did fully consider its decision to allow facsimile advertisements to be sent in those instances where the recipient and the sender or sender's principal had a prior business or contractual relationship. O.C.G.A. § 46-5-25. Even if Georgia law allows suits brought by recipients of unsolicited facsimile advertisements where the recipients do not have business or contractual relationships with the sender or the sender's principal, Georgia law specifically precludes such suits where a prior business or contractual relationship exists. Id. Thus, suits by facsimile recipients who have established business relationships with the sender are not "otherwise permitted" under Georgia state law.

**G. PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED.**

Plaintiff claims that the transmittal to him of the Facsimile at issue in this case constituted a trespass, conversion and nuisance and he claims that he is entitled to compensatory damages, punitive damages and attorneys' fees. Plaintiff cannot now seek tort damages, much less punitive damages and attorneys' fees, for conduct which has specifically been declared legal by the administrative agency charged with regulating facsimile advertising and the State in which Plaintiff seeks relief. The transmittal of the Facsimile to Verdery was not illegal or done in an illegal manner to the hurt, inconvenience, or damage of Plaintiff, and was, in fact, done with Plaintiff's consent as defined under the TCPA and the existing rules and regulations thereunder. Georgia law specifically permitted transmission of facsimile advertisements to customers such as the Plaintiff. O.C.G.A. § 46-5-25. Plaintiff, having consented to receipt of the Facsimile and having suffered no identifiable damage as a result of transmission of the Facsimile, cannot recover for trespass, conversion or nuisance nor can he recover punitive damages or attorney's fees.

**1. *Transmission of the Facsimile at issue does not qualify as a "trespass."***

To constitute a "trespass," the transmission of the Facsimile to Plaintiff must have been "unlawful" and an "abuse or damage done to the personal property of [Plaintiff]." O.C.G.A. § 51-10-3. As demonstrated above, at the time of the transmission of the Facsimile to Plaintiff, customers who provided their facsimile number were deemed to have consented to the receipt of facsimile advertisements. 47 U.S.C. § 227 and regulations thereunder; O.C.G.A. § 46-5-25. Additionally, Plaintiff was unable to testify as to any damage or abuse resulting from his receipt of the Facsimile. See Statement of Facts, § 4, infra.

**2. Transmission of the Facsimile does not constitute a "conversion."**

"Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation. . . . Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion." Decatur Auto Ctr. v. Wachovia Bank, N.A., 276 Ga. 817, 819 (2003). See O.C.G.A. §§ 44-12-150, 16-8-4. Here, Staples transmitted a facsimile which was deemed to have been consented to and authorized by Plaintiff under the specific statutory and regulatory provisions governing facsimile advertising. Additionally, Staples has merely caused a call to be placed to Plaintiff's facsimile machine; it has not exercised any dominion over the personal property of Plaintiff. No action for conversion lies under such facts.

### 3. Transmission of the Facsimile does not qualify as a "nuisance."

"That which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance. [Cits.] . . . Thus, where the act is lawful in itself, it becomes a nuisance only when conducted in an illegal manner to the hurt, inconvenience or damage of another. [Cits.]" City of Douglasville v. Queen, 270 Ga. 770, 773 (1999), *quoting* Mayor &c. of Savannah v. Palmerio, 242 Ga. 419, 425(3)(b), (c) (1978). Here, Staples merely sent a facsimile advertisement as the law allowed and still allows, to one of its existing customers. Moreover, Plaintiff admits that he suffered no inconvenience or annoyance other than that which he would have normally experienced from such legal conduct. See Statement of Facts, § 4. An action for nuisance does not lie under such facts.

### 4. Transmission of the Facsimile does not entitle Plaintiff to attorney's fees or punitive damages.

There is no provision in the TCPA authorizing recovery of attorneys' fees. 47 U.S.C. § 227. Thus, Plaintiff must resort to O.C.G.A. § 13-6-11 for recovery of such fees, if he can seek such fees at all.[5] Under the Georgia attorneys' fees provision, "Where a bona fide controversy exists, attorney's fees may be awarded under O.C.G.A. § 13-6-11 only where the party sought to be charged has acted in bad faith in the underlying transaction." Latham v. Faulk, 265 Ga. 107, 108 (1995). As demonstrated above, Plaintiff has no valid claims against Staples under the facts of this case. The FCC, the Department of Justice and other reviewing courts have declared the specific conduct at issue in this case to be legal conduct. Thus, there is no evidence of bad faith, malice, willful misconduct or that entire want of care which would raise the presumption of conscious indifference to the consequences in this case. Absent a valid

[5] Defendants contend that the inclusion of a civil penalty in the TCPA precludes claims for attorneys' fees.

legal claim, Plaintiff may not recover attorneys' fees or punitive damages. O.C.G.A. §§ 13-6-11, 51-12-5.1; D. G. Jenkins Homes, Inc. v. Wood, 261 Ga. App. 322, 325(3) (2003) ("[D]erivative claims of attorney fees and punitive damages will not lie in the absence of a finding of compensatory damages on an underlying claim."). Where the FCC and State of Georgia have specifically declared the conduct at issue legal, there can be no issue of bad faith or stubborn litigiousness.

**5. For Plaintiff's state law causes of action to go forward would have the effect of opening the door for lawsuits based on any unwanted or unexpected facsimiles.**

Sending a facsimile is a legal activity. People who turn on their facsimile machines can expect to receive facsimiles, sometimes from people from whom they do not want to receive facsimiles, such as bill collectors, for instance.[6] Allowing state law causes of action based on a one-time, two-page facsimile where there is no willful misconduct or harassment would swing open the courthouse doors for all recipients of unwanted facsimiles, even facsimiles sent for legitimate purposes.

Tort law itself does not distinguish, and cannot distinguish, between facsimiles sent for commercial advertising purposes and facsimiles sent for other legitimate purposes. Thus, with respect to state law claims, the question presented is whether sending a two-page, one-time facsimile can be a tort per se. Defendants submit that the public interest and judicial economy favor answering this question in the negative. To allow the claims under state law to go forward in this case would have the effect of subjecting all senders of facsimiles to lawsuits for

[6] People may certainly use a facsimile for improper purposes, such as the disgruntled inventor who purposely sent Ted Turner faxes of black pieces of paper solely for the purpose of exhausting Mr. Turner's toner. Such aggravating factors are not present in this case, however.

conversion, trespass and nuisance, regardless of whether the purpose of the facsimiles is commercial or non-commercial and regardless of whether the facsimiles originate from friends or enemies. It would be tantamount to a judicial declaration that the facsimile itself is annoying and subjects its users to suits for damages. Plaintiff's state law claims, lacking actual damage, lacking actual injury and lacking illegal conduct or conduct done in an illegal manner, must be dismissed.

### H. UNDER THE FCC'S RULES, THE CREATOR OF THE CONTENT OF THE FACSIMILE, STAPLES, NOT THE BROADCASTER OF THE FACSIMILE, QUICK LINK, IS CONSIDERED THE "SENDER" OF THE FACSIMILE.

The FCC clarified in 1995 and 1997 that the "sender" of a facsimile advertisement, for purposes of compliance with the TCPA, is the "creator of the content of the message." *1995 TCPA Reconsideration Order, 10 FCC Rcd at 12407, para. 35* (holding that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with the rule."). *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609, 4613, para. 6 (1997) (1997 TCPA Reconsideration Order)* ("We clarify that the sender of a facsimile message is the creator of the content of the message."). Plaintiff's claims against Quick Link must, therefore, be dismissed.

## V. CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff's claims under the Telephone Consumer Protection Act of 1991 and state law must be dismissed.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of the foregoing document by depositing same with adequate postage thereon in the United States Mail addressed as follows:

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